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A Proposed Defamation Standard for Commercial Information Systems

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Introduction

Just as in seventeenth and eighteenth century Great Britain and America a few tracts and acts set precedents for print by which we live today, so what we think and do today may frame the information system for a substantial period in the future.[1]

Computer service bureaus represent a technological conglomeration of print, broadcast, common carrier, community bulletin board, and computer communications media. This technological nexus is central to establishing a standard of liability for defamation suits against computer service bureaus.[2]

The transformation of the various media into digital format and the recent growth of various means of digitally transferring information present a potential turning point for modern lawmaking.[3] As with the introduction of the printing press, these technological changes are forcing a wholesale revision in the manner in which information is conveyed.[4] With these changes, new players are emerging with complex roles in the system of transferring information.[5] Computer information services, for example, may be publishers, sellers, and transmitters of their own and others' literary efforts. Because these players assume multiple roles, their legal responsibility for tortious use of their facilities is uncertain. Under existing law, the publisher's duty is different from that of other sellers, archivists, or common carriers.

Courts, legislatures, and the parties themselves could use several models to illustrate the legal responsibilities of commercial information providers. The simplest approach is based on an analogy to the distribution of printed matter and a theory of content control.[6] For several reasons, however, use of this analogy does not provide useful answers to several of the basic problems presented.[7] Most fundamentally, it provides a perverse incentive for the host computer user to take no action.

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1. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 10 (1983).

2. Robert Charles, Note, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121, 138 (1987).

3. The need to rethink legal doctrines is not uniform. Some torts, such as the use of electronic media to defame, do not present any novel issues. I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 999-1000 (1994); Charles, *supra* note 2, at 134-36.

4. POOL, *supra* note 1, at 23-54 (discussing the effects of computerization on the media).

5. For example, Compuserve, a large on-line service company, serves as content provider, content monitor, and pipeline, among other roles. Under traditional defamation law, each of these roles has a different standard of liability. *See infra* notes 39-58 and accompanying text.

6. *See infra* notes 59-76 and accompanying text.

7. *Id.*

One alternative is to impose a single standard of liability on host computer service providers.[8] This approach, however, presents significant technical and practical problems.[9] The one-size-fits-all rule that has emerged from other suggested approaches, such as strict liability or certain forms of negligence, cannot be practically or constitutionally applied.

A second alternative, suggested by the variation in regulation among print, broadcast, and common carrier, is to approach the problem as a question of scarcity. As access to the means of publication becomes more widespread, the intermediary's responsibility increases.[10] Again, however, there are serious problems with such an approach.[11] First, the scarcity rationale for regulation does not apply when there are thousands of vendors. Second, the alternative rationale for regulation—protection of captive audiences—does not apply when the buyer chooses to access the service.

Solving the problem is contingent on balancing constitutional requirements and policy, the need for stability and practicality, and a concern for compensating real injuries. The solution these factors suggest is a relatively high fault standard for host computer owners, such as commercial bulletin boards; liability would result only if the owners knew or had reason to know that their systems contained defamatory matter, and then failed to remove the matter within a reasonable amount of time.[12] This approach most effectively balances the concerns of fairness to both the injured party and the owner in a period of rapid technological change.

I
Setting the Problem: Legal Traditions and Merging Technologies

A. The New Publishing System

Computers and modern communication methods present a variety of ways to transfer fact and opinion that previously did not exist: simply put, words are converted into a digital form that can be sent, saved, archived, searched, and reconstituted. Moreover, these digital constructions can be moved to a single reader or multiple readers nearly instantaneously, or saved until the reader finds it convenient.

8. *See infra* notes 76-91 and accompanying text.
9. *Id.*
10. *See infra* notes 92-100 and accompanying text.
11. *Id.*
12. *See infra* notes 101-105 and accompanying text.

In essence, electronic publication encompasses aspects of mail, publishing, libraries, and discourse.[13] This is essentially the notion of digital convergence.[14]

The new technology is dependent on the interconnection of computers for the sharing of information regarding schemes of electronic publishing.[15] The technology itself is relatively straightforward. A computer user connects her computer by private or public phone lines to a host computer.[16] Once connected, the user accesses whatever services the host computer owner makes available.[17] Some services have the look and feel of personal communications such as electronic mail[18] and chat services.[19] Others have the look of publication services. For example, newsgroups or bulletin boards present the comments of readers and writers on a particular topic such as computers, politics, or the arts.[20] Finally, the host computer may provide an archiving service, holding text and graphics files that are available for users to transfer via the connection to their own computers.[21] Superficially, the analogies to common carrier, publisher, and librarian are

13. Anne W. Branscomb, *Common Law for the Electronic Frontier; Computers, Networks and Public Policy*, SCI. AM., Sept. 1991, at 154. Branscomb writes:

> The ease with which electronic impulses can be manipulated, modified and erased is hostile to a deliberate legal system that arose in an era of tangible things and relies on documentary evidence to validate transactions, incriminate miscreants and affirm contractual relations. What have been traditionally known as letters, journals, photographs, conversations, videotapes, audiotapes and books merge into a single stream of undifferentiated electronic impulses.
>
> [T]he diversity of inputs and outputs . . . makes it difficult to determine who is author, publisher, republisher, reader or archivist.

Id.

14. POOL, *supra* note 1, at 189-225 (discussing electronic publication).

15. Charles, *supra* note 2, at 126.

16. Edward J. Naughton, Note, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 416-17 (1992); Charles, *supra* note 2, at 125.

17. Pool and others have noted the variety of services that can be made available through electronic publishing. *See* POOL, *supra* note 1, at 224; Glenn Groenewold, *The Net Meets the Law; The Legalities of Information Transmission; Rules of the Game; Column*, UNIX REV., Dec. 1994, at 79 ("As a conduit for e-mail between individuals, [the Internet] has the characteristics of a common carrier. At the other extreme, when it compiles and transmits news, fiction, or opinion, it resembles a newspaper or magazine.").

18. Naughton, *supra* note 16, at 418-19; David J. Loundy, E-Law 3.0: Computer Information Systems Law and System Operator Liability in 1995 (manuscript on file with the author). Electronic mail generally permits the author to direct a post to a particular person or defined group of persons designated by the sender. The newsgroup, though technologically similar to electronic mail, differs in that it has no predefined audience.

19. Loundy, *supra* note 18. Chat services, by immediately transferring messages among members of a self-defined contemporaneous group, permit groups of individuals to "converse."

20. Naughton, *supra* note 16, at 417; Loundy, *supra* note 18.

21. Naughton, *supra* note 16, at 417; Loundy, *supra* note 18.

obvious; the host computer provides elements of each of these activities.

Because of the digital nature of the services, they present some novel or heightened problems for host computer operators.[22] First, some of the services, such as bulletin boards or newsgroups, are designed for widespread distribution or broadcast.[23] Second, the extent of the initial publication and republication can be enormous due to the potential size of the commercial service and the interconnected nature of the communications system.[24] Third, the distribution process itself is immediate.[25] Finally, there is the complication of anonymity: many authors disguise their identities, and the structure of the networks permits this hiding.[26]

Diversity of owners presents a second complication. On one end of the spectrum are the large commercial entertainment and information services such as CompuServe, Prodigy, LEXIS/Nexis, and Dow Jones.[27] At the other end are thousands of small commercial and amateur bulletin boards.[28] These thousands of boards and the steadily

22. This Article assumes that the writer or first publisher of defamatory or other tortious digital work is liable. As Trotter Hardy and others have suggested, that level of publication does not appear to present a particularly novel legal problem. Hardy, *supra* note 3, at 999.

23. Charles, *supra* note 2, at 146.

24. Prodigy, for example, claims to have two million subscribers and processes 60,000 messages a day. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229 at *3, *8 (N.Y. Sup. Ct. 1995). In addition, the Internet encompasses an estimated ten million computers linked to several million users. Herb Brody, *Of Bytes and Rights: Freedom of Expression and Electronic Communications*, TECH. REV., Nov. 1992, at 22.

25. Brody, *supra* note 24 ("Computers linked to telecommunications networks spread information—and misinformation—faster than it can be managed.").

26. Charles, *supra* note 2, at 145.

27. Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Daniel v. Dow Jones & Co., 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987); Charles, *supra* note 2, at 124. In a March 1995 article, Robert Charles summarized the commercial size of the larger bulletin boards:

> CCBBs [commercial computer bulletin boards] that offer access to the Net for a fee—plus their own in-house bulletin boards and services—are flourishing. If sales figures are any indication, CCBBs are the runaway locomotive of the 1990s. According to *Forbes Magazine*, CompuServe Inc., H&R Block's subsidiary, made 74 million pretax dollars in fiscal 1993 . . . and its stock quintupled since March of 1992. Likewise, Prodigy Services Inc., a partnership between IBM Corp. and Sears-Roebuck & Co., boasts two million users and 1993 sales of $200 million.

Robert B. Charles, *Beware the Spectre of Corporate On-Line Libel*, AI EXPERT, Mar. 1995, at 15.

28. Bob Brown, *Electronic Bulletin Board Operators Risk Libel Suits; Laws Have Yet to Catch Up with Technology*, NETWORK WORLD, June 20, 1988, at 15; Charles, *supra* note 2, at 15.

declining costs of computing[29] suggest that entry is relatively easy.[30] On the other hand, it would also appear that few of these entrants have the resources of the major commercial services that would be necessary to set up screening devices.

While in theory every host computer can supervise conduct on the machine (most simply by cutting off outside access), content control in fact varies greatly among hosts. In some systems, it is apparent that the host attempts no control.[31] In others, the system attempts to screen for profanity by using computerized search programs that look for questionable words.[32] Finally, some bulletin boards manually screen messages.[33]

Taken together, these new forms of publication present legal challenges both in the United States and internationally.[34] As expected, the authors will be liable. One defamation suit, for example, involved a defamatory message that was placed on an office network by an employer and read by fellow employees, resulting in a $15.5 million judgment.[35] "Flaming"[36] is another potential basis for a defa-

29. In his 1983 classic, Pool noted the phenomenal decline in the cost of computing. POOL, *supra* note 1, at 227-28. If anything, that trend seems to be accelerating and has been abetted by the relative declining cost of long distance communications. Christopher R. Conte, *Reaching for the Phone*, GOVERNING MAG., July 1995, at 32; *Long-Distance Rates Could Drop*, PLAIN DEALER, Mar. 29, 1995, at 1C. *See, e.g.*, Michael Martz, *GTE Proposes Raising Local Rates*, RICHMOND TIMES-DISPATCH, June 10, 1995, at C1. Bypass strategies that avoid some of these costs may further encourage use of electronic publishing. *Bytes*, DENVER POST, July 24, 1995, at E4.

30. Naughton, *supra* note 16, at 434.

31. A criminal case against an MIT student whose bulletin board apparently became a pathway for stolen software suggests the dangers inherent in an uncontrolled board. Jules Crittenden, *Ruling Clears Way for Computer Bandits*, BOSTON HERALD, Dec. 30, 1995, at 1; *Charges Dropped Against Student*, COMPUTER FRAUD & SECURITY BULL., Feb. 1995.

32. Brody, *supra* note 24, at 22 (Prodigy uses software to screen for obscenities).

33. Charles, *supra* note 2, at 126; Brody, *supra* note 24, at 22. Prodigy, for example, attempted to prescreen the content of its bulletin boards in an effort to secure a marketing position as a family-oriented safe product. Naughton, *supra* note 16, at 434.

34. Apart from the problems associated with domestic law, the reach of interconnected systems poses problems for each nation's legal system. *See, e.g., Proposed UK Libel Law Poses Threat to Internet Service Providers*, FINTECH TELECOM MARKETS, July 6, 1995.

35. *Texas Jurors Award $15 Million to Employee Called a Thief*, LIABILITY WK., May 3, 1993.

36. "Flaming" is a term used to describe outrageous electronic mail (e-mail). It is often directed at neophytes that stumble over the traditions of the Internet. For a critique of some of the effects of computerization on social intercourse, see CLIFFORD STOLL, SILICON SNAKE OIL: SECOND THOUGHTS ON THE INFORMATION HIGHWAY (1995). Throughout the text, Stoll gives examples of the strange and accepted goings-on in electronic commerce.

mation law suit.[37] The increased access to information via computers presents new dangers associated with the invasion of privacy.[38] The most novel problem, however, is the liability for defamation of the host computer's operator.

B. Defamation Law: The Legal Structure

The goal of defamation law is to protect the reputation of the injured person by providing a remedy for his injury.[39] In its basic form, it protects one's interest in relations with others:[40] the key is the plaintiff's appearance in the eyes of third parties, not the plaintiff's perception of the defamatory words.[41]

This goal of protecting reputation is carried out in the basic notion of defamation and the twin torts of slander and libel.[42] Actionable defamation requires a false and defamatory statement concerning another, its nonprivileged publication to a third party through the fault or negligence of the publisher, and some sort of recognized injury.[43] A plaintiff is defamed if the statement "tends so to harm [his] reputation . . . as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[44] A slander generally results if the defamatory communication is oral, a libel if it is written or broadcast.[45]

37. Dana Blankenhorn, Editorial, *The Law of the Modem*, NEWSBYTES NEWS NETWORK, Mar. 26, 1993. This sort of defamation, however, does not present a special legal problem. *See* Hardy, *supra* note 3.

38. Brown, *supra* note 28, at 15 (Indiana lawsuit pending against operator for revealing contents of a user's e-mail message).

39. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 118 (1992); RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (1977).

40. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 111, at 771 (5th ed. 1984).

41. *Id.*

42. As Prosser and Keeton have noted, the problems inherent in defamation law are legion and have significant historical roots. *Id.* at 771-73, 771 n.5. These problems are well beyond the scope of this article except as they relate to the problems associated with new technologies and the law's reaction to them. *See, e.g., id.* at 787 (discussing the application of libel and slander to broadcast).

43. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

44. RESTATEMENT (SECOND) OF TORTS § 559 (1977). For a discussion of various statements found defamatory, see KEETON ET AL., *supra* note 40, § 111. As the cited material suggests, the differences revolve around what constitutes ridicule, but the differences appear to turn on situational factors such as time, place, and tone. Generally, however, there must be some misstatement of fact, either direct or implied by a stated opinion, that results in the defamation. RESTATEMENT (SECOND) OF TORTS §§ 565-566.

45. RESTATEMENT (SECOND) OF TORTS § 568 states:

(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communica-

Libel and slander require a publication.[46] In the case of slander, the publication is typically an oral comment to a third party. Regarding libel, an intentional transfer of a writing to a third person constitutes the publication. In either case, the repetition of the defamation, directly or through an agent,[47] is a republication and a separate tortious act.[48] As Prosser and Keeton note:

> Every repetition of the defamation is a publication in itself, even though the repeater states the source, or resorts to the customary newspaper evasion "it is alleged," or makes it clear that he does not himself believe the imputation. The courts have said many times that the last utterance may do no less harm than the first, and that the wrong of another cannot serve as an excuse to the defendant. Likewise every one who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with publication, although so far as strict liability is concerned the responsibility of some of these has been somewhat relaxed.[49]

The republication rule, however, is tempered by the view that each version may constitute only one defamation per publisher, regardless of the number of copies made.[50]

The rule is further tempered by fault requirements that vary with the level of control exerted over content. An author, broadcaster, or

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tion that has the potentially harmful qualities characteristic of written or printed words.

(2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

(3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

Id. § 568. Section 568A takes the view, not accepted in all states, that a defamatory broadcast always results in libel. *Id.* § 568A. *See* KEETON ET AL., *supra* note 40, at 787. In most situations, the appropriate theory of liability is presumably libel. In the case of chat programs, in which parties have immediate interconnection with one another and the situation is essentially conversational, there appears to be a superficial argument that the rules of slander, and with them the necessity to show greater damages to establish a claim, should apply. This argument will not be addressed.

46. RESTATEMENT (SECOND) OF TORTS §§ 558, 577 (1977); KEETON ET AL., *supra* note 40, § 113; RODNEY A. SMOLLA, LAW OF DEFAMATION § 4.12[1] (1986).

47. One may be liable for defamation committed through an agent. RESTATEMENT (SECOND) OF TORTS § 577 cmt. f (1977); KEETON ET AL., *supra* note 40, § 113.

48. RESTATEMENT (SECOND) OF TORTS § 576 (1977); SMOLLA, *supra* note 46, § 4.13[1][c].

49. KEETON ET AL., *supra* note 40, § 113. This definition of republication raises a related question about the effect of copying messages as part of a reply when answering e-mail or posting a comment to a bulletin board. Conceptually, each copy might constitute an additional republication. *See* SMOLLA, *supra* note 46, § 4.13[3]. Again, this argument is not addressed here.

50. RESTATEMENT (SECOND) OF TORTS § 577A (1977); KEETON ET AL., *supra* note 40, § 113; SMOLLA, *supra* note 46, § 4.13[3].

any other direct publisher of a work, must be shown to have intentionally or negligently published the work.[51] However, the liability of other potential parts of the distribution process varies.[52] A republisher, such as a bookstore, library, or newsstand, is liable only if it knows or has reason to know of the work's defamatory character.[53] A transmitter, typically a common carrier, likewise is liable only if it knows or has reason to know of the defamatory nature of the writing. In some cases, there is a further privilege to transmit even when the transmitter knows of the writing's defamatory nature, as long as it has no reason to believe that the material is not privileged.[54] Finally, the owner of a traditional bulletin board (as in a grocery store or in a common area of an apartment building) on which defamatory matter is posted is not liable unless it knows or has reason to know of the posting and fails to take action to remove the defamatory message within a reasonable time.[55]

The rationale for the lower levels of liability for different parts of the distribution process is based primarily on notions of efficiency, fairness, and privacy. On the one hand, "[t]he composer or original publisher of a defamatory statement, such as the author, printer or publishing house, usually knows or can find out whether a statement in a work produced by him is defamatory or capable of a defamatory import."[56] The vendor or library, however, lacks the ability to sort through the volumes of text to locate defamatory material.[57] Likewise, because the common carrier owes a duty to carry the messages of all patrons and must respect their privacy, it would face an unfair and intolerable burden if required to check each item.[58] The bulletin board owner is in a similar position in that it makes its space available without apparent controls and may lack the day-to-day review that is available to other publishers.

51. RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977). Thus, an accidental republication, if not negligent, does not render the defendant liable. *Id.* cmt. o. The liability of a broadcaster is described separately. *Id.* § 581.

52. *See generally* KEETON ET AL., *supra* note 40, § 113; Joseph P. Thornton et al., *Videotex Symposium: Libel*, 36 FED. COMM. L.J. 178, 180 (1984).

53. RESTATEMENT (SECOND) OF TORTS § 581(1) (1977).

54. *Id.* §§ 581(1), 612(2); SMOLLA, *supra* note 46, § 4.13[3] and cases cited in notes; Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 102 (1992); Charles, *supra* note 2, at 132.

55. RESTATEMENT (SECOND) OF TORTS § 577(2), § 577 cmt. p; KEETON ET AL., *supra* note 40, § 113; SMOLLA, *supra* note 46, § 4.12[5] and cases cited therein. But see Perritt, *supra* note 54, at 99 n.164, for a different description of the liability and case holdings.

56. RESTATEMENT (SECOND) OF TORTS § 581 cmt. c (1977).

57. Hardy, *supra* note 3, at 1003.

58. Charles, *supra* note 2, at 143; Loundy, *supra* note 18.

The law's recognition of a sliding standard of liability depending on the amount of control exerted by each member in the chain of distribution presents a novel problem for electronic publishing. The medium raises the possibility that the owner of the host computer may be liable for significant damages due to the widespread scope of the systems and the limited ability of the owner to police content. It is further raised by the network culture itself, one that seems to encourage outrageous behavior on the part of its participants. The owner of the host computer, therefore, faces potentially significant liability due to the actions of third parties. The level of that liability, however, is uncertain because it is not clear which role the host computer owner is playing.

C. The Courts' Analogical Approach to Computer Services

Faced with the new medium of electronic publishing and a multitude of standards, the courts in two reported cases have drawn analogies to prior technology in assigning liability for defamation. The cases, which involved the posting of allegedly defamatory material on computer bulletin boards, forced the courts to consider the defendants either publishers or secondary publishers. In each case, the degree of control exercised by the host computer owner tipped the issues of efficiency and fairness to one side or the other.

One decision, which examined the liability of a bulletin board for posting an allegedly defamatory message, treated the host computer owner as a secondary publisher. In *Cubby, Inc. v. CompuServe Inc.*,[59] CompuServe utilized a computer forum to publish the report of a third party vendor that allegedly defamed a competing business. CompuServe asserted that an independent contractor prepared and placed the work on its system without editorial review by CompuServe. The trial court, on a motion for summary judgment, viewed CompuServe as a secondary publisher and dismissed the action because the plaintiff did not show that CompuServe knew or had reason to know the defamatory nature of the newsletter. Among the factors the court focused on in analogizing CompuServe to a secondary publisher was the lack of editorial control exerted.[60] Based on this lack of control, the court found that CompuServe was "in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for

59. 776 F. Supp. 135 (S.D.N.Y. 1991).

60. *Id.* at 140. The alternative, comparing CompuServe to a publisher, would have been unreasonable given the company's size and the potential chilling effect on the distribution of information. *Id.* at 139-40 (citing Smith v. California, 361 U.S. 147, 153 (1959)).

access to the publications."[61] The court complemented its rationale by noting the speed at which materials are added to the system due to its digital nature.[62]

A 1995 New York trial court decision suggests another possible analogy. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[63] an investment bank sued for damages allegedly resulting from a flame posted on the defendant's investment bulletin board. In contrast to the facts of *Cubby*, the plaintiff in this case alleged that the host maintained some editorial control over the content of its bulletin boards through content guidelines to customers, software screening, manual screening by board leaders, and the use of an emergency message deleting function.[64] The court, based on this evidence of control, distinguished *Cubby* and concluded that the defendant, Prodigy, acted as a primary publisher when it held itself out as retaining editorial control and implemented that control through software and guidelines.[65] The court concluded that increased exposure to defamation liability is the cost for the editorial control Prodigy exercised to promote itself as a family-oriented service.[66]

In the little case law available, the trend is evident: attempts to control content will result in greater potential liability.[67] Services will move up the scale from either mere transmitters or secondary publishers to publishers as they exert greater editorial responsibility over the content of the files found on their systems. This result flows directly from the view that defamation on a computer network is analogous to traditional print materials.

D. Problems with the Analogical Approach

Although the analogical approach used in *Cubby* and *Stratton Oakmont* is a perfectly understandable means of developing the law in this area, it presents significant analytical problems. First, the categories used in the analogies are not likely to hold up over time. Second, the factual premises of the categorizations are flawed. Finally, in an industry in which technological merger is the norm, the analogical approach sends odd signals to service providers.

61. *Cubby*, 776 F. Supp. at 140.
62. *Id.*
63. 1995 N.Y. Misc. LEXIS 229 (May 26, 1995).
64. *Id.* at *3-4.
65. *Id.* at *8-10.
66. *Id.* at *13.
67. For an extended discussion of the significance of control in defamation standards at different points in the publication process, see Perritt, *supra* note 54, at 66, 110-11.

The basic categorization used by courts in defamation law is premised on the control of the impressions or copies, and the ability to screen their content. Essentially, this approach views liability as the control of atoms, rather than ideas.[68] The person who transmits the ideas initially, or who formats them for mass distribution either on paper or through broadcast,[69] is principally responsible for either the intentional or negligent distribution of the work. A transmitter or secondary publisher, however, has little or no control over the form, and the liability therefore decreases, even though the ideas that caused the harm are the same.

Merging such media, however, makes these distinctions questionable. The computer service acts as publisher, distributor, and as part of the transmission process.[70] The service takes on characteristics of both broadcast and common carrier.[71] Indeed, it seems logical that one service could take on several different roles simultaneously—directing composition, serving as a public bulletin board, and permitting real time debate.[72] As a result, the boards face indeterminate legal liability,[73] and further change renders the legal approach unstable.

Additionally, the factual premises of the courts' divisions are flawed. As suggested by *Cubby* and *Stratton Oakmont*, the courts have sought to determine if the computer service acted as a publisher by reviewing content. Instead of determining liability from what the services could be doing, the courts instead measured the defendants by their current practices. This approach suffers in two ways. First, even at the lowest levels of liability for transmitters and secondary publishers, there is liability for "reason to know."[74] Thus, it is clearly relevant that software and manual review are possible. In *Cubby*, however, these tools were not relevant to the outcome. Similarly, the limits of these tools, given the enormous number of postings and the lack of adequate ways to check content, were apparently irrelevant in *Stratton Oakmont*. In essence, there is no sensitivity in these decisions to either side of the problem.

The second factual problem is the lack of sensitivity to the differences in services. Just as merger presents a challenge to the very sta-

68. For a related discussion on the challenges presented by digitization, see NICHOLAS NEGROPONTE, BEING DIGITAL 11-85 (1995).

69. In defamation, once again, the analogy is to libel rather than slander because paper and tape last longer and have wider impact than spoken words.

70. POOL, *supra* note 1, at 197; Perritt, *supra* note 54, at 67.

71. Charles, *supra* note 2, at 136; Naughton, *supra* note 16, at 412-13.

72. *See supra* notes 13-38 and accompanying text.

73. POOL, *supra* note 1, at 233; Groenewold, *supra* note 17, at 79.

74. *See* RESTATEMENT (SECOND) OF TORTS § 577(2) (1977).

bility of the approach, the various levels of potential service provision, from small amateur entrants to large commercial services,[75] raise serious questions about the courts' ability to properly assess liability using a one-size-fits-all rule.

Finally, the analogical approach sets up some rather bizarre incentives for service providers. The test essentially imposed by the courts is whether a service reviewed content. The courts ignore, particularly in *Cubby*, whether the provider is able to provide the content review. The distinction between publishers and secondary publishers rests, however, on whether it is fair and practical to hold a particular party to that responsibility. For the initial publisher who sets the type and checks the content, the duty exists. For others further down the distribution chain with fewer resources, such as booksellers and libraries, there is no duty. In contrast, the courts have cast the duty in terms of what the parties decided to do, rather than determining what they should do based on their ability to review and screen content for defamatory material. The courts' approach thus sets up a perverse incentive to do nothing.[76]

These problems are fundamental to the analogical approach to defining defamation liability. The approach is unstable, factually flawed, and in application creates perverse incentives. Thus, it makes sense to look for potential alternatives.

II
Alternative Models in Assigning Liability in Defamation Cases

The criticism of *Cubby* and *Stratton Oakmont* suggests that a workable approach for assigning defamation liability to a host computer owner should reconcile concerns for stability, recognize the possible differences in the technology, and be fair. Among the alternatives are the use of a single, flexible standard, such as negligence or strict liability, or resort to another regulatory construct that appears to be superficially related to the problem. Each of these alternatives, however, presents distinct problems.

A. A Negligence Standard

One alternative is to assign a duty of reasonable care to the host computer owner. Under a negligence standard, the required degree of care would adjust to the problem and the nature of the technol-

75. Hardy, *supra* note 3, at 1003; Naughton, *supra* note 16, at 437-38.
76. *Prodigy on Trial*, ADVERTISING AGE, June 5, 1995, at 20.

ogy.[77] A court would as a result be able to balance injury prevention with the cost of preventing that loss.[78] This standard of care might be augmented with specific rules defining the appropriate levels of action by the host computer owner.[79] For example, one author, Robert Charles, has suggested that owners be required to maintain names and addresses of users, warn subscribers, review messages in a public space within a reasonable amount of time, remove messages if the owner knows or has reason to know that the message is defamatory, and remain liable if it knowingly or negligently transmits a message that it knows or has reason to know is defamatory.[80]

As in the decided cases, this approach attempts to balance conflicting values. Plainly, there is a sense that innocent third parties need a higher degree of protection than that provided by a "knowing" standard. The danger, which Charles attempts to address through a series of specific rules, is the chilling that an undefined and undefinable duty of care would likely cause. Courts, whose methods of applying analogies in this area are already suspect, then would be left to divine the appropriate balance. Even with specific rules, there is likely to be some chilling effect on board ownership or usage since standards of liability are unclear and will probably remain so.

The second problem is that the particular prescriptions to avoid liability appear to be unrealistic. Verification of each user would be nearly impossible even in commercial systems, and truly impossible for amateur systems. The degree of telephone and credit card fraud that currently exists suggests that basic security of the sort suggested by Charles is not possible.[81] Warnings, likewise, do not prevent those willing to defame from defaming. The warning is no more than what a normally responsible person would be expected to know, and that knowledge does not currently prevent a lack of civility. The remainder of the prescriptions to avoid liability are premised on constant review of messages in public spaces. Plainly if a service as large as Prodigy cannot protect its space from defamatory messages, it is un-

77. This alternative is similar to the scheme of multiple rules, applied to landowners and dependent on the status of the injured party, which has been rejected in favor of a standardized, if vague, general duty of care to maintain a premises.

78. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW §§ 6.1-6.2, 147-52 (3d ed. 1986).

79. Charles, *supra* note 2, at 147.

80. *Id.* at 147-48.

81. Cheryl Phillips, *Cracking Down on Fake IDs: States Turn to High-Tech to Fight Fraud*, USA TODAY, July 13, 1995, at 1A; Brian McWilliams, *Financial Insecurity*, COMPUTERWORLD, June 26, 1995, at 79; *Telephone Fraud: Nearly One in Five Californians Have Been Fraud Victims According to Just-Released AT&T Survey*, EDGE, July 3, 1995; *Fraud Pervasive, Yet Largely Undefined*, ILL. LEG. TIMES, June 1995, at 1.

likely that any other service could either. In sum, the solution is unworkable.

Finally, Charles' solution eventually resolves itself into a "know or reason to know" requirement that is likely to generate the same concerns that result from the current case law.[82] A reason to know standard, with some modifications, might be correct, but the current interpretation is suspect.[83] Thus, as a means of protecting the interests of injured parties, it is not a strong solution.

B. A Strict Liability Standard

A second approach, offered by Trotter Hardy, is to assign to the host computer-owner strict liability for defamation:[84] the owner would be liable for any defamation appearing on its system.[85] Such an approach addresses the uncertainty of identifiable and solvent defendants and the ability of the services to take precautions.[86] The effect is to force owners to decide the amount of risk they are willing to incur and structure their services accordingly.[87] Additionally, Hardy argues that a further benefit is derived from the owner's ability to spread the risk of loss through its fee structure.[88]

While this approach is superficially more stable, its likely effect is less certain. First, the courts may shift the "fault" questions into other areas of concern, such as the determination of whether the statement is defamatory.[89] Second, there are problems with First Amendment law. Under the First Amendment, a defendant may not be liable for defamation without a showing of fault of some sort.[90] The rationale for this fault requirement is to prevent the chilling effect of defamation on a highly protected activity. Strict liability would have that chilling effect. Finally, there is a fundamental flaw in the approach. As Hardy explains, the ability of a strict liability system to work depends on the owner's ability to seek indemnification from the parties causing the loss.[91] Anonymity and the speed by which messages transfer and are replicated, however, make this prospect unlikely. Access to net-

82. Charles, *supra* note 2, at 148.
83. *See supra* notes 59-76 and accompanying text.
84. Hardy, *supra* note 3, at 1044.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. Prosser and Keeton have noted that the doctrine of defamation already suffers because courts are uncomfortable in this area and have devised numerous and often incoherent rules as a result. KEETON ET AL., *supra* note 40, § 111.
90. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).
91. Hardy, *supra* note 3, at 1045.

works is so open that the writers may not be located. Replication and repetition may make indemnification a process of hide and seek with no end.

C. First Amendment Analogues

A final approach that might be argued for setting content regulation (though not necessarily the degree of fault) is the public regulation of the media under the First Amendment. As Pool noted in his classic work, a three-tiered system of regulation has emerged in the regulation of content in the media.[92] While print is relatively unregulated, both common carriers, due to their economic monopoly over access, and broadcast due to the physical scarcity of electronic spectra, have been subject to government regulation of either access, prices, or content.[93] Pool and Smolla, however, correctly conclude that content regulation other than that which assures access to competing voices is outside the justification based on scarcity.[94]

Even if it were relevant, the analogy to broadcast or common carrier would likely prove unstable in a time of merging technologies. At this point the reasoning is redundant: the owner is both publisher, broadcaster, and common carrier.[95] There is no particular standard that applies.

Finally, the whole approach assumes scarcity, and that simply is not the case. Bandwidth or spectrum is not a justification for content regulation.[96] Moreover, there are literally thousands of hosts from which to choose.[97] While there may be information niches that turn into natural monopolies, merger suggests that there are unrestricted paths that may result in alternatives that sweep around these niches.[98]

Content regulation, based on protecting audiences, should also be unavailing. In broadcast, for example, the United States Supreme Court has recognized the authority of the Federal Communications Commission to regulate indecent speech to protect children and captive audiences.[99] When the customer initiates the contact or has means to block the offensive message, however, the concern for audi-

92. POOL, *supra* note 1, at 233.

93. *Id.* at 234-40.

94. *Id.* at 230; SMOLLA, *supra* note 39, at 326-27.

95. POOL, *supra* note 1, at 233.

96. *Id.* at 236; SMOLLA, *supra* note 39, at 327 (scarcities change with technology and cannot be reliably predicted).

97. *See supra* notes 13-38 and accompanying text.

98. POOL, *supra* note 1, at 211-12.

99. FCC v. Pacifica Found., 438 U.S. 726, 727 (1978).

ence protection is negated.[100] In the case of computer services, the most such balancing justifies is a very low level of content regulation. Alternatives, such as warnings and customer initiated blocking, are the more consistent alternatives.

Just as the suggestions of a particular level of liability prove inappropriate, so does the attempt to construct a set of rules from media regulation. Simply put, neither the technology nor the reasoning provides a sound basis for divining the right set of rules. The solution must necessarily be found by deciding how compensation can be afforded in a manner that is consistent with the technology and the underlying values of open communications and fair compensation.

III
Finding the Appropriate Balance

A. Important Goals of a Compensation System and Factual Assumptions

As the prior discussion suggests, there are several factors important to defining the appropriate level of liability. First, the rule should be constitutional both in its technical and philosophical approach. It makes little sense to suggest a rule that either fails to correspond with the appropriate constitutional standard or rests on policies that are contrary to constitutional doctrine.[101] Thus, some level of fault is required before an owner can be found liable for defamation, and the policy itself should have the least chilling impact in light of the need to afford compensation.

Second, the standard should provide a stable guide to the industry. In this regard, the standard should be understandable and provide a consistent set of instructions. The alternative, a highly flexible standard, might seem appropriate, but it would lead to the high level of uncertainty inherent in a changing environment and present the courts with difficult factual questions they seem ill-equipped to answer.[102]

100. Sable Communications of Cal. v. FCC, 492 U.S. 115, 128 (1989); MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW 780-86 (1992); SMOLLA, *supra* note 39, at 328-31.

101. The strict liability approach offered by Hardy suffers from this problem in particular. *See supra* notes 84-91 and accompanying text. Likewise, direct content regulation is unwarranted. *See supra* notes 92-100 and accompanying text.

102. Note that even in the negligence standard suggested by Charles there is an attempt to specifically define behaviors that would constitute due care. *See supra* notes 77-91 and accompanying text.

Third, the solution should be consistent with the factual background. It should limit liability to steps which are possible. Simply put, the solution should be practical.

Finally, the effect of the rule should be fair. It should not provide a perverse incentive for owners to allow harm in order to prevent liability.[103] Moreover, the rule should compensate for real injuries that are neither under-valued nor over-valued. The rule should not undervalue injuries by being too lenient and thus potentially injure any sense of community norms developing in computer networks.[104] At the same time, the rule should recognize the wild and cantankerous nature of current networks. In this sense, the rule should not overvalue claims because they occur in a situation in which some license is the norm. Indeed, there is a sense that these are the radical technologies of the times.[105]

B. A Notice-Plus Standard

Taken together, these four concerns warrant a relatively high hurdle before liability can be assigned to the host computer owner. Minimally, the owner should know or have reason to know that the publication is defamatory, and either transmit or fail to remove it. In a sense, then, the current *Cubby* standard is relevant as a starting point, but in fact a higher standard, like that of the traditional bulletin board or property owner, provides the more exacting and appropriate level of fault. This high showing is justified by constitutional concerns, the need to provide a stable rule, and the need for practicality and fairness.

First, the rule provides a constitutional basis for finding liability because it requires a showing of fault before imposing damages. In this situation, a relatively high level of fault may be required to satisfy other important concerns discussed below. Moreover, the high level of fault is consistent with constitutional goals of maintaining a vigorous communication system. The networks are essentially taking the role of the press and the soapbox and should be afforded similar constitutional deference. The fact that they also serve common carrier and broadcast functions does not warrant a lower level of protection since neither access nor surprise of a captive audience is at issue.[106]

103. *See supra* note 76 and accompanying text.

104. Smolla makes a similar point in discussing the role of content regulation and the underlining rationale for some checks on outrageous behavior. SMOLLA, *supra* note 39, at 331.

105. POOL, *supra* note 1, at 226-51.

106. The broad-based access that bulletin boards present their users also warrants a constitutionally high level of protection. An analogy to defamation law that is related to

Second, this approach is likely to prove more stable than either the application of a negligence rule or a simple reason-to-know standard. A negligence rule by definition is highly flexible; it changes with what is reasonable under the particular circumstances. Properly applied, a simple reason-to-know standard offers a more direct path, and might offer a good accommodation, but allows for a perverse incentive and may suggest to courts a duty to set up screening devices. The latter concern for small boards is not practical, and for large boards may not be effective. The solution is to create a reason to know standard that requires some notice and opportunity for the owner to respond within a reasonable time.

Third, the approach is factually sound. Small board owners have few messages, but apparently lack the capability to screen. Large board owners have the capability to screen, but cannot keep up with the abundance of files moving through their systems. By moving to a notice-and-remove system of liability, the host computer owner can more properly arrange its affairs to suit the market it wants to serve. In particular, large owners can set up detailed systems of review (as Prodigy allegedly did in attempting to make itself a family-oriented service), but when they do, they also accept the risk of infuriating some customers by removing defamatory material prior to complaint. Customers, on the other hand, will become aware that they have some responsibility to police the system if they want to develop a higher level of discourse in a particular forum. Only when the owner finds a problem statement or a customer brings a defamatory statement to the owner's attention, and the owner fails to react within a reasonable time, would there be liability.

An interesting side benefit to this approach is that it solves the problem of the anonymous post. The owner would not be saddled with the impossible task of identifying and verifying each person using the system in an attempt to find some sort of indemnification. Rather, the rule establishes liability only if the board owner fails to take action on notice. It is the owner's fault that is being assessed.

Finally, the approach offers a fair compensation rule. It does not create a perverse incentive to avoid taking action. Rather, it defines a different standard based on the unique characteristics of the owner's

public figures is appropriate here. Public figures face a higher hurdle to establish liability, in part because the defamed party has access to the media. See generally KEETON ET AL., *supra* note 40, § 113. By the same argument, someone defamed on a bulletin board has nearly immediate and complete opportunity to respond. Given this ability, the defamed party should expect to face a higher level of fault, *i.e.* a knowing failure on the part of the host computer owner to dispose of the offending message.

position in the chain of distribution and the merger of several different communications functions into a single entity. It also allows the market to determine the appropriate level of self-regulation that owners should undertake. If owners wish to capture a niche as a safe haven, they can do so if they can find customers willing to pay the service prices. On the other hand, owners who do not censor still must remain vigilant for complaints from customers alleging that they or others have been defamed. There is no duty to snoop or censor, but on open bulletin boards, the approach does not declare open season on the truth. Thus, injured third parties have a remedy, but it is practical, tied to fault, and based upon constitutional considerations that warrant constraint on the rule.

IV
Conclusion

Finding a balance, when the basic structure of the problem appears fluid, is no small task. Yet the value system for determining the liability of a host computer owner points to a relatively high threshold of liability. Other standards may be used, but they are either uncertain, unstable, or unconstitutional. In contrast, a notice and duty-to-remove standard balances the interest in compensation with the variety of players and the complexity of the system in which the players operate. Moreover, such a standard comports with constitutional and network community standards. It may permit some outrageous behavior, but the standard provides an effective check when such behavior becomes injurious.